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No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE W. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The charge of the trial court appears at R. 39–48. The opinion of the Circuit Court of Appeals (R. 51–60) is reported in 86 F. (2d) 379.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 19, 1936 (R. 60). The petition for writ of certiorari was filed on December 24, 1936, and was granted on February 1, 1937 (R. 60). The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Senate Committee was competent to institute, and to exact evidence in, the inquiry in which respondent testified.

2. Whether there was a "*law*" of the United States authorizing an oath to be administered in that inquiry.

3. Whether the questions to which respondent gave the Senate Committee false answers were material to the inquiry in which respondent testified.

4. Whether the respondent ceased to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand.

STATUTES INVOLVED

(1) Section 125 of the Criminal Code, U. S. C., Title 18, Sec. 231, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material

matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

(2) Senate Resolution No. 215, 71st Cong., 2d Sess., 72d Cong. 6841–6842:

Resolved, That a special committee consisting of five Senators, to be appointed by the Vice-President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before senatorial primaries, senatorial conventions and the contests and campaign terminating in the general election in November 1930.

No Senator shall be appointed upon said committee from a state in which a Senator is to be elected in the general election in 1930.

Said committee is hereby authorized to act upon its own initiative and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made before said committee under oath by any person, persons, senatorial candidate, or political committee, setting forth allegations as to facts which under this resolution it would be the duty of said committee to investigate, the said committee shall investigate such charges as fully as though it were acting upon its own motion, unless after a hearing upon such complaint the committee shall find that the allegations in said complaint are immaterial or untrue.

Said committee is hereby authorized in the performance of its duties to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. It is specifically authorized to require the attendance of witnesses by subpoena or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, clerical, and other assistants; and to employ stenographers at a cost not exceeding 25 cents per one hundred words.

Said committee is hereby specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any

subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law.

The expenses of said investigation, not exceeding in the aggregate $100,000, shall be paid from the contingent fund of the Senate on vouchers signed by the chairman of the committee or the chairman of any subcommittee.

All hearings before said committee shall be public and all orders or decisions of the committee shall be public.

The committee shall make a full report to the Senate on the first day of the next session of the Congress.

STATEMENT

In this case the point of principal inquiry is whether a proper charge was given to a jury trying the respondent for alleged perjury before a Senate Committee.

On April 10, 1930,[1] the Senate of the United States passed Senate Resolution No. 215, 71st Con-

[1] Observe that this date was at least one month before the respondent considered being a candidate either for a state or national office. His first thought of running for any office was in May 1930 (R. 25–26). His first political action was on June 25, 1930, when he sent to the County Treasurer's office an application, accompanied by a filing fee, in order to appear on the ballot in the election for Railway Commissioner for the State of Nebraska (R. 34).

gress, 2d Session, 72 Cong. Rec. 6841–6842 (which is printed in full at R. 1–2, and which was appropriately introduced in evidence, R. 20–21). Under its terms the Vice-President was—

> authorized and directed to investigate the compaign expenditures of the various candidates for the United States Senate, the names of the *persons,* firms, or corporations *subscribing,* the *amount contributed,* the method of expenditure of said sums, and *all facts in relation thereto,* not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate *in enacting any remedial legislation* or *in deciding any contest* which might be instituted involving the right to a seat in the United States Senate.
>
> The investigation hereby provided for, in all the respects above enumerated, *shall apply to candidates and contests before senatorial primaries,* senatorial conventions and the contests and campaign terminating in the general election in November 1930. [Italics added.]

The Committee so appointed was "specifically authorized to require the attendance of witnesses by subpoena or otherwise" and was further—

> specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said

> committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law.

The official records of the Senate show that the Vice-President duly appointed a Committee which, as finally composed, consisted of Senator Gerald P. Nye, of North Dakota; Senator Porter H. Dale, of Vermont; Senator C. C. Dill, of Washington; Senator Roscoe C. Patterson, of Missouri; and Senator Robert F. Wagner, of New York. (R. 21–22.) This Committee, pursuant to the resolution under which it was established, unanimously authorized Senator Nye, the Chairman, "to act as a sub-committee and to appoint a subcommittee of one or more members to hold hearings as in his judgment was desirable" (R. 24). Acting as a sub-committee (R. 25), Senators Nye and Dale, after several preliminary meetings (R. 24), met on September 22, 1930, in the Federal Building in Lincoln, Nebraska.[2] (R. 24.)

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[2] The resolution had provided:

"Said committee is hereby authorized in the performance of its duties to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper."

At the time of this meeting, the Nebraska primary election of August 12, 1930 (R. 22, 32) had already been held; but there had not yet been held the general Senatorial election of November 1930 (R. 21). For that primary election, several applications for the Republican primary had been filed. Senator George W. Norris of McCook, Nebraska (hereinafter referred to as Senator Norris), had duly filed on January 11, 1930 his application (R. 22); and one W. M. Stebbins had duly filed on November 12, 1929 his acceptance of nominating petitions previously filed on his behalf (R. 23). The respondent had also attempted to file on July 5, 1930 [*State ex rel. Smith* v. *Marsh*, 120 Neb. 287, 288] an application for the same primary, but the Supreme Court of Nebraska ruled that this application "was not filed * * * within the time required by law"[3] and ordered the Secretary of State of Nebraska "to omit [the name of the respondent] from the list of candidates for United States Senator of Nebraska, certified by him to the various county clerks and election commissioners." (R. 32.) *State ex rel. Smith* v. *Marsh*, 120 Neb. 287, 295.

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[3] Under Nebraska law it was requisite that the application, to be effective, should be filed 40 days prior to the primary election. Neb. Comp. St. (1922) § 2114, as amended by Neb. Laws 1925, c. 108, § 1; Neb. Comp. St. (1929) § 32–1124. The respondent's attempted application was only 38 days prior to that date.

Knowing these facts, the Committee, attended by its Secretary (R. 23–24) and its official stenographer (R. 25–27), on September 22, 1930, called the respondent and swore him as a witness (R. 25). The respondent then stated under oath that "he was going to tell the truth and the whole truth." (R. 37.) On the morning of the twenty-second, he told the Committee something of his background (R. 25), discussed his original intention to run for railway commissioner of the State of Nebraska (R. 26); and then "testified he did not file for railway commissioner because he thought about filing for United States Senator" (R. 26). The Committee recessed, and returned in the afternoon (R. 26). At that time the following colloquy took place between the examiner and the respondent (R. 26):

> Q. Now what assurance did you have of financial support and backing?
>
> A. None whatever.
>
> Q. In your campaign?
>
> A. None whatever.
>
> * * * * *
>
> Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, independents, or anybody say they would help to finance your campaign?
>
> A. No, sir.
>
> * * * * *
>
> Q. Did you receive any money from anybody in the campaign?
>
> A. I did not.

These answers were false, and intentionally so. The respondent himself has admitted "that these answers were not true" (R. 36). He "knew at the time of testifying he had received $500.00 and the $50.00 and what he was saying was not true." (R. 37.) During the whole examination on this day the respondent did not endeavor to correct, explain, or qualify the answers just set forth. He "concluded his testimony about four o'clock in the afternoon" (R. 33), although the subcommittee continued listening to other evidence, and "on the evening of September 22 they adjourned at 4:40 P. M. until 10:00 A. M. of September 23, 1930." (R. 26.) So far as appears, the Committee never expected or asked the respondent to return to the stand.

When the Committee resumed its hearings the next day, seven other witnesses took the stand (R. 33). At least one of them, A. Paul Johnson, flatly contradicted the respondent's falsehoods and made "changes" in the respondent's story (R. 38). Johnson told the Committee, as he subsequently told the jury in the case at bar (R. 27–30), what the facts really were.

As shown in the evidence in the case at bar, Johnson, together with three confederates, Victor Seymour, Hugh Drake and Oscar Drake, on Sunday, June 29, 1930, had met at the Fort Kearney Hotel, Kearney, Nebraska. The Drakes were local persons (R. 27), but "Seymour said he had a prom-

inent place in the Republican party" (R. 29). Pursuant to a plan devised at that hotel, Seymour gave Johnson $50 in currency, and Johnson, on the next day, Monday, June 30, approached the respondent and requested him "not to file as a candidate for Railway Commissioner, but to file for the United States Senate" (R. 27). Johnson told the respondent that if he were willing to accept this suggestion, "the Republican party would support him" and "would be behind him"; Johnson would immediately deliver to him the "$50.00 in currency [given to Johnson by Seymour] to pay his filing fee"; "his campaign expenses would be paid estimated at $500.00; that he would be taken care of, and if he did not withdraw within the period that the law required, he would be delivered another $500.00."[4] (R. 28.)

Johnson has testified that nothing "was done with this $50.00 on June 30, 1930 [that is, the $50 which Seymour had given him the day before], but on July 2, 1930, witness stated that he delivered the identical $50.00 to Norris," the respondent (R. 28). The next day, in addition to this $50, Johnson gave to the respondent a $500 bond (R.

[4] As to the promise of this second $500, there may be some doubt, although the jury does not appear to have felt any. The respondent has "said that A. Paul Johnson did not tell him he would give him another $500.00 if he would not withdraw as a candidate for United States Senator" (R. 36). However, this minor variation is of no consequence inasmuch as respondent has admitted the facts with respect to the first $500.00 and the $50.00. (R. 35, 38.)

28) which Johnson had received through the mail (R. 28), after a telephone conversation with Seymour (R. 30). [Compare *Seymour* v. *United States*, 77 F. (2d) 577, 583 (C. C. A. 8th).]

It is not denied that this testimony of Johnson in the instant case is, with one minor exception,[5] substantially the same as the testimony which he gave before the Senate sub-committee on September 22 and 23, 1930. And as Johnson was giving his testimony to that Senatorial tribunal, the respondent listened to it. Indeed he accepted from the Chairman of the Committee an invitation to "come down and have a chair near Mr. Johnson, because I want you to hear what he is saying." (R. 33.)

Having heard, in the presence of this tribunal, a direct refutation of the tale he had spun for them the previous day (R. 37), the respondent, after consulting with his own counsel, of his own motion asked, and was granted, permission to return to the stand (R. 36). On his voluntary return, the respondent and the examiner had the following colloquy (R. 38):

> Q. Now, Mr. Norris, do you want the story that you have told us of your entire connection with this campaign to stand as your story?
>
> A. Outside of I might make a few changes in it, the same as Mr. Johnson has. He did

[5] In September 1930 Johnson did not implicate Seymour in the scheme (R. 30).

give me $50, and on going back to Missouri I mailed back to him the $50. I got a bank draft and mailed it back to him after I got my commission check.

Q. Mailed it back to whom?

A. Mr. Johnson.

Q. You thought, then, Mr. Johnson was paying this $50?

A. I borrowed it.

Q. You borrowed it? Didn't you hear his testimony that someone had given him that money to give you?

A. No; besides that.

Q. You had borrowed something in addition to that filing fee, $50?

A. Yes, sir.

Q. From Mr. Johnson?

A. Yes, sir.

Q. You sent that back to him?

A. You will find the transaction there.

Q. But you never made any reimbursement of the $50 you got for the filing fee?

A. No, sir; I never paid him that back.

A. [*sic*] Now, what other changes would you want to make in the story you have told us?

A. I believe that is all. I would like to go on tomorrow and make some changes.

Q. Let us make whatever changes are needed there, and if you have made any untruthful statements today surely you know what they are and can correct them now.

A. You mean yesterday?

Q. Yesterday.

A. Do you have a copy of that there?

Q. No; we don't have a copy of that.

A. That is all that I know, outside of——

Q. That is all that you know? Now, what of this $500 that was given you?

A. That was given to me by Mr. Johnson and cashed at North Platte with my brother.

Aware of the direct contradictions in the testimony of the respondent before the Senate Committee, the grand jury in the Lincoln Division of the District of Nebraska in the Eighth Judicial Circuit on June 23, 1931, indicted the respondent for perjury under Section 125 of the Criminal Code, U. S. C., Title 18, Sec. 231. (R. 1–8.) On the actual trial the facts were proved by duly authenticated official records (R. 20–23, 24, 32–33) and by the testimony of John Andrews, the Secretary to the Senate Committee on Campaign Expenditures (R. 23–25); William M. Day, the official stenographer to the Committee (R. 25–27, 33–34); Frank Healy, a special assistant to the Committee (R. 31); A. Paul Johnson, who handed the money to the respondent (R. 27–31); and Victor Seymour, who supplied Johnson with the money (R. 31–32).

Moreover, the respondent himself took the stand (R. 34–37), admitted that he had been promised "support if he filed for the United States Senator and so decided to run for the Senate" (R. 35); that he had received from Johnson the $50 filing fee and the $500 bond (R. 35); that he had the $500 bond "wired * * * to him by Western Union to Estes Park where he got the money and where he spent about a week on a vacation" (R. 36); and

finally that he "knew at the time of testifying [before the Senate Committee that] he had received $500.00 and the $50.00 and what he was saying was not true." (R. 37.)

In his charge the District Judge told the jury (R. 40):

> Even though the defendant testified falsely, that is not sufficient to convict him, nor would it be sufficient that he testified falsely but did so carelessly, or negligently, or hastily, but it must appear that he testified falsely and so testified intentionally and that he did not believe this testimony was true when he gave it.

And, when he came to discuss the testimony that the respondent on September 23 had retracted what he had said on September 22, the District Judge commented as follows[6] (R. 47):

> As to this testimony you are instructed that this testimony may be considered by you along with the other evidence on the question of whether or not considering what the defendant testified on the day prior and his act of testifying again the following day and what he said in his testimony, the defendant wilfully, that is, intentionally testified falsely in his testimony on the day before in the matters charged against him.

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[6] It may incidentally be remarked that in our opinion, in view of the respondent's flat admission that on September 22 he lied and knew he was lying (R. 37, 36), this charge was, if anything, too favorable to the respondent. See footnote 15, page 35, *infra*.

The District Judge, over exception, refused the following, among other, instructions requested by the respondent (R. 49):

> 4. The Jury are instructed that even if you find that the defendant in this case made false answers to the questions which were put to him at the hearing before the Senate Committee in question, and if you also find that while this hearing was yet continuing and while the matter was yet pending before the Senate Committee, the defendant corrected any erroneous or false statements that were made, if any, then you will find the defendant not guilty. (Refused. Defendant excepts.)
>
> * * * * *
>
> 6. The Jury are instructed that if you find the defendant, in the latter portion of his examination before the Senate Committee, corrected statements that may have been incorrect or even intentionally false, made prior to the correction of the defendant, then you will find the defendant not guilty. (Refused. Defendant excepts.)

The jury returned a verdict of guilty (R. 12), and the court imposed a sentence of a fine of $100 and imprisonment for three months (R. 14–15). The respondent appealed to the Circuit Court of Appeals (R. 15–16), and that court reversed the judgment (R. 60). In its opinion, after quoting (R. 53) the respondent's two requested charges which we have just quoted, the court held that, although part of the requested charges was "ambigu-

ous and not clear", another part "correctly states the law" (R. 58). The Circuit Court of Appeals then held that the following would have been an appropriate charge and that failure to grant some such charge was reversible error (R. 58):

> The jury are charged that the law encourages the correction of erroneous and even intentionally false statements made by a witness upon a trial or hearing, and so, if you shall find and believe from the evidence that defendant made false answers to the questions or any of them which were put to him at the hearing before the Senate subcommittee (which questions are set out in the indictment and which questions the court has already in this charge called specifically to your attention), yet that defendant, while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements, if any, which had theretofore been made by him in answer to said questions, you should find the defendant not guilty.

The Government on December 24, 1936, filed a petition for certiorari which was granted on February 1, 1937.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the trial court erred in refusing to submit to the jury the question whether

respondent had fully and fairly retracted and corrected his original false testimony.

2. In reversing the judgment of the United States District Court for the District of Nebraska.

SUMMARY OF ARGUMENT

The testimony upon which the respondent was convicted of perjury was given by him before a tribunal competent to exact evidence. That tribunal was a Senate Committee constituted and acting pursuant to S. Res. No. 215, 71st Cong., 2nd Sess. This resolution had its constitutional foundation in the right of Congress to institute inquiries and exact evidence with respect to possible exercises of either its power to enact legislation (*McGrain* v. *Daugherty*, 273 U. S. 135, 173) or its power to judge of the elections of its own members (*Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597). In an inquiry carrying out the terms of that resolution, the members of the Committee were by "a law of the United States" authorized to administer the oath taken by the respondent. R. S. Sec. 101. Moreover, the questions asked of the respondent, and the willfully false answers given by him were material and pertinent to that inquiry. Thus the only important issue in this case is whether the respondent is entitled to escape the pains and penalties of the perjury statute, Section 125 of the Criminal Code, on the ground that he retracted his false testimony the day after it had been given and he had left the stand.

The perjury statute does not create an exception or immunity for a witness who recants false testimony which he has deliberately given, and which he has allowed to stand until other witnesses have exposed his falsehoods. Moreover, it would be against sound public policy to read such an exception into the statute. An insistence upon truth at every stage of a lawful inquiry is necessary not merely to protect whatever substantive interests may be at stake, but also to insure expeditious procedure in the tribunal conducting the inquiry. There is no likelihood that the grant of an immunity such as is claimed on behalf of the respondent will lead a witness who has deliberately lied to tell the truth later. Indeed such grant is more likely to tempt a knave to tell a falsehood in the first place and wait to see if he is detected.

On the doctrine of avoidance of perjury by subsequent recantation there is no decision or dictum in this Court. The English law does not recognize this doctrine in cases where the original false statement was deliberate and unequivocal. *Reg.* v. *Holl,* 45 Law Times Reports 69 (Q. B. D., 1881). *Reg.* v. *Philpotts,* 5 Cox. Cr. Cas. 363 (1851). The prevailing view in the American state courts does not apply the doctrine unless the original falsehood was due to ambiguity, inadvertence, or accidental error. And no case here or abroad regards perjury as undone where not only the original falsehood was clear and deliberate,

but also where the retraction did not come until after the witness had left the stand and other witnesses had exposed him. *Masaichi Ono* v. *Carr*, 56 F. (2d) 772 (C. C. A. 9th).

ARGUMENT

INTRODUCTORY

A person can be properly indicted and convicted under Section 125 of the Criminal Code only if it is proved (1) that he has "taken an oath before a competent tribunal," (2) that the proceeding in which he took the oath was one "in which a law of the United States authorizes an oath to be administered," (3) that in the course of his testimony he stated a "material matter," and (4) that at the time he made the statement he "willfully and contrary to such oath" did "not believe [the statement] to be true."[7]

The respondent contends that the first three elements are lacking in this case. He argues (1) that the Senate Committee was not competent to institute, and to exact evidence in, the inquiry in which he testified (Br. Opp. 17–20), (2) that there was no *law* of the United States authorizing an oath to be administered in that inquiry (Br. Opp. 22–23), and (3) that the questions to which he answered falsely

[7] Observe that the issue is not whether the statement is false, but whether the person who testified believed it to be false. *Allen* v. *Westley*, Hetley 97, 124 Eng. Rep. 372 (1629); *Vernon* v. *North* (unreported), referred to in Holdsworth, *History of English Law*, Vol. IV, p. 517, note 3; see page 48, *infra*.

were not material to that inquiry (Br. Opp. 17–20). The respondent does not and, in view of his own evidence in the case at bar (R. 37, 36), could not, argue that at the time he gave the answers he believed that they were true.

However, the respondent does make a fourth contention: to wit, that even if he once was guilty of perjury within the exact words of the statute, he ceased to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand.

We shall discuss each of these four issues, although on the first three our argument will be brief inasmuch as they were decided in favor of the Government by the court below; and inasmuch as they are invoked in this Court not by the petition for certiorari but by the respondent's brief in opposition as alternative supports for the judgment rendered below. (Br. Opp. 16.)

I

THE SENATE COMMITTEE WAS COMPETENT TO INSTITUTE, AND TO EXACT EVIDENCE IN, THE INQUIRY IN WHICH THE RESPONDENT TESTIFIED

The Senate Committee before whom the respondent testified was constituted under the authority of Senate Resolution No. 215, 71st Congress, 2d Session, passed April 10, 1930. 72 Cong. Rec. 6841–6842. This resolution directed the Committee "to investigate the campaign expenditures of

the various candidates for the United States Senate * * * and all facts in relation thereto * * * which would *not only* be of public interest *but* which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate." [Italics added.]

This resolution (in purpose and language strikingly similar to S. Res. 195, 69th Cong., 1st Sess., passed May 19, 1926, 67 Cong. Rec. 9677–9678, considered in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597) does not, as the respondent suggests (Br. Opp. 18), authorize the Committee to ascertain facts merely on the ground that they are of public interest.[8] Compare *McGrain* v. *Daugherty*, 273 U. S. 135, 180 (first paragraph). The Committee is limited to such investigations of campaign expenditures of candidates for the United States Senate and such related facts of public interest as would not only be of public interest but would also "aid the Senate in enacting any remedial legislation or in deciding any contest

[8] Of course the resolution does not direct an *ad hominem* investigation of the conduct of the respondent himself. On April 10, 1930, when the resolution was passed, probably no Senator had ever heard of the respondent, and indeed the respondent had never considered engaging in any political activity. See footnote 1, page 5, *supra*.

which might be instituted involving the right to a seat in the United States Senate." Thus the Resolution proceeds upon two alternative constitutional bases, each of which has already been approved by this Court. That is to say, either House of Congress may institute inquiries and exact evidence with respect to possible exercises of either its power to enact legislation (*Sinclair* v. *United States*, 279 U. S. 263, 291; *McGrain* v. *Daugherty*, 273 U. S. 135, 173; *In re Chapman*, 166 U. S. 661, 671) or its power to judge of the elections of its own members. (*Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613.)

While the respondent admits that for either of these two ends, either House of Congress may constitutionally institute an inquiry and exact evidence, he asserts that neither end was properly invoked in the Resolution under review.

He first contends that legislation could not have been the objective of the inquiry since, as he says, "Congress has no power to legislate for the purpose of regulating primary elections." (Br. Opp. 18.) It is extremely doubtful whether this statement is true. Although without the authority of and prior to the Seventeenth Amendment Congress could not by criminal penalties directly regulate a primary election for United States Senator (*Newberry* v. *United States*, 256 U. S. 232, 254) this Court has never held that the situation is the

same with respect to action taken after the effective date of that amendment.[9]

Moreover, even if Congress could not directly regulate the primary elections, it could enact legislation which would incidentally take into account those primaries. Thus it could punish Federal officials who practiced corruption in such contests. *United States* v. *Wurzbach,* 280 U. S. 396. And it does not appear that Congress could not limit participation in a congressional election to persons and parties that had been free from corruption, trickery, or shabby practices in an immediately

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[9] In the *Newberry* case, *supra*, Mr. Justice McReynolds who delivered the opinion of the Court, in which Justices Holmes, Day, and Van Devanter concurred, while adverting to the Seventeenth Amendment (pp. 250, 251, etc.) seems to have put it out of consideration in that case on the ground that the authority there conferred had not been exercised by "appropriate legislation" (pp. 254–255). Mr. Justice McKenna, in his concurrence, explicitly "reserves the question of the power of Congress under that Amendment" (p. 258). Chief Justice White was of opinion that (particularly in view of the legislative history in which Senator Sutherland played so prominent a part) the Seventeenth Amendment gave Congress power to regulate primary elections for United States Senators (pp. 263–269). And Mr. Justice Pitney's dissent in which Justices Brandeis and Clarke concurred, proceeds on reasoning which would clearly make valid a congressional statute enacted pursuant to the Seventeenth Amendment and designed to regulate senatorial primaries (pp. 285–286): On this whole point, see the argument of Mr. Wickersham in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 603. But see a loose reference to the *Newberry* case by Holmes J. in *United States* v. *Wurzbach*, 280 U. S. 396, 398.

preceding primary. Finally, it may be noted that since practices adopted in a primary (particularly practices such as the respondent's) are likely to be repeated or copied in the ensuing or a subsequent congressional election, a Congressional committee might justifiably inquire into primary election practices as an aid to preparing comprehensive legislation on congressional elections as to which it admittedly has regulatory power. *Ex parte Siebold,* 100 U. S. 371; *Ex parte Clarke,* 100 U. S. 399; *Ex parte Yarbrough,* 110 U. S. 651, 661–662; *United States* v. *Mosley,* 238 U. S. 383. Compare *Smiley* v. *Holm,* 285 U. S. 355; *Newberry* v. *United States,* 256 U. S. 232. "We cannot assume on this record that the action of the Senate was without a legitimate object; * * * it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded." *In re Chapman,* 166 U. S. 661, 669–670; *McGrain* v. *Daugherty,* 273 U. S. 135, 178.

Quite independently of potential legislative action, potential judicial action justified the Senate in passing Resolution No. 215, and, what is more important, justified the Committee in proceeding, pursuant to that Resolution, to exact evidence from the respondent even as late as September 22, 1930. Under the Constitution the Senate has "the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1.

'That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.' *Reed* v. *County Commissioners,* 277 U. S. 376, 388." *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 613; *Seymour* v. *United States,* 77 F. (2d) 577, 580 (C. C. A. 8th). Now it is true that by September 1930 it was unlikely, though perhaps not impossible,[10] that the respondent would ever present to the Senate credentials of his election. But it was by no means clear that the man who did present himself from Nebraska would not have been implicated in such tricky, corrupt, "sinister", or "malign" practices as to be unworthy of a seat in the Senate. *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 615; *Newberry* v. *United States,* 256 U. S. 232, 258, 284. When the Committee met in September, the election was still two months away. No one knew who would win. Before the Committee actually made inquiry of the respondent it was reasonable to suppose that his campaign had been financed

[10] By September it was obvious that the respondent would not be the Republican nominee. He had been ruled off the ballot by the State Court; and the primary, which had taken place on August 12, 1930, without his name appearing, had resulted in a victory for Senator George W. Norris of McCook. Yet, it was possible that the respondent might repeat his shabby trick by running, and perhaps achieving success, as an independent in the election itself.

not by the Republican party or by some defeated Republican aspirant like Stebbins, but had been financed by the Democratic party or even by the successful candidate in the Democratic primary. The Democratic candidate might justifiably have concluded that he could win only if his Republican opponent was someone other than Senator Norris; and that the only way to prevent the Senator's renomination was to finance the respondent. That this argument is not attenuated, but is based on a possibility in the mind of the Senate investigating Committee, is shown by the record. When the respondent was on the stand, and engaged in the very colloquy which embraced the alleged perjury, he was asked by the Committee (R. 26):

> Did you get any assurance from anybody that they would help you—Republican, *Democrat,* independents, or anybody say they would help to finance your campaign? [Italics added.]

Thus the inquiry was designed to disclose whether a candidate still in the race for Senator had participated in the respondent's trickery.

From the foregoing it is clear that the Senate had the power to institute the inquiry and exact the testimony provided for in Resolution 215. It also had the right to devolve upon a committee of its members (or a part of that committee) this authority to investigate, to examine witnesses and to report. *Barry v. United States ex rel. Cunning-*

ham, 279 U. S. 597, 613; *McGrain* v. *Daugherty,* 273 U. S. 135, 168. It follows that the Committee before whom the respondent testified was, within the meaning of the perjury statute (i. e., Section 125 of the Criminal Code), "a competent tribunal."

II

A LAW OF THE UNITED STATES AUTHORIZED AN OATH TO BE ADMINISTERED IN THE INQUIRY IN WHICH THE RESPONDENT TESTIFIED

The respondent suggests that the oath administered to the respondent was an oath authorized merely by the resolution of a single house of Congress, and was not authorized by "law" (Br. Opp. 23). This argument is plainly without merit. The oath was authorized not only by Resolution 215, but also by the Act of June 26, 1884, c. 123, 23 Stat. 60; R. S. § 101; U. S. C., Title 2, Sec. 191, which provides:

> The President of the Senate, the Speaker of the House of Representatives, or a chairman of a Committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination. Any Member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof.

Under this statute the chairman and members of a Congressional committee are empowered by law to administer oaths to witnesses before the committee. *McGrain* v. *Daugherty*, 273 U. S. 135, 167–168; *Reed* v. *County Commissioners*, 277 U. S. 376, 381; *Sinclair* v. *United States*, 279 U. S. 263, 291. They are therefore as competent to administer oaths to congressional witnesses as clerks of court to witnesses in court.

III

THE QUESTIONS TO WHICH RESPONDENT ANSWERED FALSELY WERE MATERIAL TO THE INQUIRY IN WHICH RESPONDENT TESTIFIED

The respondent, in an argument which, as the lower court said (R. 54), "involves the most attenuated casuistry," suggests (Br. Opp. 20–22) that the questions asked of him by the Senate Committee and the willfully false answers given by him were not material or pertinent to the inquiry authorized by Senate Resolution 215.

"When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate." *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613. In the case at bar the Senate vested in its select committee authority—

> to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or

> corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

Thus the principal subjects of investigation were the "campaign expenditures," the campaign subscriptions, and "*all facts in relation thereto,*" of "the various candidates for the United States Senate."

The respondent argues that *he* was not a "candidate for the United States Senate," and not engaged in any campaign (Br. Opp. 20–21), inasmuch as he merely unsuccessfully and belatedly endeavored to make an application to run in the Republican primary of August 12, 1930. It is, we submit, of no consequence whether the respondent was or was not a "candidate" or was or was not engaged in any "campaign." The sinister conduct in which he was participating looked *on its face* as though it might have been promoted by the expenditures of another person who undoubtedly was a "candidate" engaged in a "campaign." See

pp. 26–27, *supra*. Until questions as to this conduct and its surrounding circumstances were asked and answered, no one could tell what was the true situation. Thus the questions were material to the inquiry.

Furthermore, the truth is that the respondent was a "candidate" for the United States Senate engaged in a "campaign" for that office. As the King's Bench, speaking through Lord Mansfield, has held [10a] and as this Court seems to have recognized,[11] "any one is a candidate for whom a vote is

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[10a] *Combe qui tam* v. *Pitt*, 1 Wm. Blackstone, 523, 96 Eng. Rep. 304 (K. B. 1764). Under an early corrupt practices act [Sections 7 and 8 of 2 Geo. II, c. 24 (1729), relating to bribery to procure any person to give his vote] a defendant was charged with a "bribe to give a vote at that election, for a person then a *candidate*" (p. 525). It was argued that the persons for whom votes were solicited were not candidates. The argument was rejected, Lord Mansfield saying (p. 524): "Before the time of election, any one is a candidate, for whom a vote is asked. This very fact makes the person in whose behalf the bribe was given a candidate." This decision is cited with approval (though with a slight error in orthography) in 1 Hawkins, *Pleas of the Crown*, p. 315, note 4.

[11] For the use of the word "candidate" by this Court, see *Newberry* v. *United States*, 256 U. S. 232, especially Mr. Reynolds J. at pages 245, 247, 257, White C. J. at pages 274–275, and Pitney J. at pages 277, 279, 286, 288, 293, 294, 295. For the use of the word "campaign" see same case, especially White C. J. at pages 274–275, and Pitney J. at pages 276, 288, 293, 294, 295. And note the use of these terms by Mr. Charles Evans Hughes, counsel for plaintiffs in error, in that case, p. 236.

asked." *Combe qui tam* v. *Pitt*, 1 Wm. Black. 523, 96 Eng. Rep. 304 (K. B. 1764).[12]

The questions propounded and the answers given were therefore clearly material and pertinent, and, under the proper practice, this conclusion could properly have been announced [13] to the jury as a matter of law. *Sinclair* v. *United States*, 279 U. S. 263, 299.

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[12] State cases in this country are in accord. In *Adams* v. *Lansdon*, 48 Idaho, 483, 505, 110 Pac. 280, in construing Section 24 of Idaho Sess. Laws, 1909, p. 196, which limited the promotion or campaign expenses of every "candidate for nomination to any office at any primary," (p. 495), the court held that a person "becomes a candidate whenever he begins to lay his plans to aid or promote his nomination" (p. 505). In *State ex rel. Brady* v. *Bates*, 102 Minn. 104, 112 N. W. 1026, in construing Section 350 of Minnesota Laws, 1895, chapter 277, p. 664, a local corrupt practices act which required the filing of an affidavit of expenditures by "a candidate for nomination or election to an elective office" (p. 106), the court held that "a person who has filed his affidavit of intention [to enter a primary] * * * has thereby become a candidate for nomination under its [the act's] terms" (p. 110). See also *Leonard* v. *Commonwealth*, 112 Pa. 607, 4 Atl. 220, 224.

[13] It is not entirely clear for just what purpose the District Judge in the case at bar discussed in his charge the meaning of the terms "candidate" and "campaign." It seems that he was considering not the issue whether the questions were "material", but whether they were "understandable" by the respondent and whether the witness had answered them truly and in accordance with his understanding. (R. 42–44.) See also the opinion of the Circuit Court of Appeals in the case at bar (R. 54–56) and in *Seymour* v. *United States*, 77 F. (2d) 577, 582–583 (C. C. A. 8th).

IV

THE RESPONDENT DID NOT CEASE TO BE A PERJURER BY RETRACTING HIS FALSE TESTIMONY THE DAY AFTER IT HAD BEEN GIVEN AND HE HAD LEFT THE STAND

There is no dispute in this case as to the facts with respect to either the respondent's original statements on September 22, 1930, when he first testified (R. 26), or his subsequent retraction on September 23, 1930 (R. 38).

On the first day there was not the slightest ambiguity in the testimony: the questions were clear; the answers unequivocal; and both taken together left nothing open to construction or misconstruction. The answers given by the respondent were (R. 36), and were intended to be (R. 37), false.[17] As he himself has said in testifying in the case at bar, he "knew at the time of testifying [before the Senate Committee] he had received $500.00 and the $50.00 and what he was saying was not true." (R. 37.) In other words, there was no mere error, inadvertence or slip due to carelessness. Having told his deliberate lies, the respondent completed his testimony, and, so far as the Committee was concerned, he was never expected or asked to return. If at this point the Senate Committee had concluded its proceedings, it can hardly be denied that the respondent would clearly have been guilty of perjury. ["When false testimony concerning a material fact has been know-

[17] The lower court agreed that "It is clear that his first answer was false, upon any view." (R. 56.)

ingly given, perjury has become and continues to be an accomplished and completed thing." *Seymour* v. *United States,* 77 F. (2d) 577, 582 (C. C. A. 8th).]

However, a night passed, and on the next day seven other witnesses testified before the Committee (R. 33). At least one of them, Johnson, flatly contradicted the respondent's falsehoods (R. 38). The respondent "heard most of the testimony" (R. 37) of these intervening witnesses and during the time Johnson in particular was testifying the respondent had accepted from the Chairman of the Committee an invitation to "come down and have a chair near Mr. Johnson, because I want you to hear what he is saying." (R. 33.)

Hearing this complete refutation of the story he had given the day previous, the respondent, after consulting with his own counsel, of his own motion asked, and was granted, permission to return to the stand (R. 36). Once back on the stand, he did not claim that the falsity of his first testimony was due to misunderstanding, or minor errors, or ambiguity. He sought and was allowed to "make a few changes in it." (R. 38.) That is, he withdrew part of what he had said, and made just such substitutions as were required in order to make his story jibe with the stories of other witnesses so far as he remembered them (R. 38).

On this state of facts, the issue of law is narrow. We are not here considering the effect of a correc-

tion of an inadvertent error or an explanation of an ambiguous statement. *Arguendo,* we may assume that where the falsity in a statement is due to inaccuracy or minor error or ambiguity, it either never was perjury, or, if it was, may not be punished if the statement is subsequently corrected or amplified. Nor are we here considering a statement made contrary to the truth, but without an intent to deceive. Of course, such a statement is not perjury either at common law or under the statute here involved. It is not made "willfully"; and it cannot be said that the statement is one which the witness does not "believe to be true." [15]

The precise issue in the case at bar is whether a witness who, having an intent to deceive, had made, as to a material matter, an unequivocally false statement, which he left unchanged throughout his examination, ceases to be a perjurer if he, after intervening witnesses have flatly contradicted him,

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[15] Under some circumstances, the fact that a witness made or was willing to make a second statement amplifying or correcting his second statement might serve as proof that he did not make the first and false statement willfully or with intent to deceive. This seems to have been the situation in *Thrasher* v. *State*, 31 Okla. Cr. 95, 237 Pac. 139, referred to by the lower court (R. 59). Indeed (too generously, we submit), the trial judge in the instant case gave the respondent the benefit of this rule by including it in his charge to the jury. (R. 47.) See page 15, *supra*. The rule really should not have been invoked since here it is not claimed that there was an absence of *mens rea* at the time the respondent first testified. From the start he knew his "answers were not true." (R. 36, 37.)

but before the proceeding has terminated, voluntarily returns to the stand, withdraws his first statement, and substitutes for it a second and entirely repugnant statement.

On this issue the words of the statute seem so clear that there is hardly room for argument. It declares that "Whoever, having taken an oath before a competent tribunal * * * that he will testify * * * truly * * * shall willfully and contrary to such oath state * * * any material matter which he does not believe to be true, is guilty of perjury * * *." The respondent asks that the prosecutor and the Court add to the statute an additional and qualifying term so as to create an exception where the witness recants the false testimony he has uttered. "This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction." *Osaka Shosen Kaisha Line* v. *United States,* U. S. Sup. Ct. Oct. Term 1936, No. 224, pages 2–3.

But the respondent points out (Br. Opp. 5–7) that the statute (which has long been on the books [16])

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[16] The first Federal perjury statute was the Act of April 3, 1790, c. 9, § 18, 1 Stat. 116. This legislation of the First Congress took a rather simpler form than the law we now have on the books. The present statute is, however, not materially different from the Act of March 3, 1825, c. 65, § 13, 4 Stat. 118; and is in no substantive respect different from the Act of July 12, 1876, c. 180, § 10, 19 Stat. 86, as carried forward into R. S. § 5392.

is merely a codification of the common law.[17] He then asserts, mistakenly we submit, that at common law and under statutes codifying the common law there is a "uniform rule * * * which had its origin as early as 1600" (Br. Opp. 15) that a witness may escape the pains and penalties of perjury by recanting, at any time "while the matter is yet pending" (Br. Opp. 13), such falsehoods as he has uttered. In answer we contend: first, that, *on principle,* the rule asserted is unsound and inconsistent with the common law; and second, that,

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[17] It was not until the sixteenth century that perjury in a witness was recognized as a crime punishable in other than ecclesiastical courts. Holdsworth, *A History of English Law*, Vol. 4, p. 515. "Very ancient law seems to be not quite certain whether it ought to punish perjury at all. Will it not be interfering with the business of the Gods?" Pollock & Maitland, *History of English Law*, Vol. 2, p. 541. But this early reluctance to add temporal sanctions was overcome during the realistic and effective government of the Tudors. Thus 1 Hawkins, Pleas of the Crown, c. 69, § 2, states: "Perjury by the common law seemeth to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a course [sic] of justice, swears absolutely in a matter of some consequence to the point in question whether he be believed or not." And Sir Edward Coke, 3 Inst. 164, in words later adopted by Blackstone, 4 Commentaries, *137, defines perjury as "a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears lawfully, absolutely, and falsely in a matter material to the issue or point in question." In Great Britain at the present time the subject of perjury is covered (though not exclusively) by the Perjury Act of 1911, 1 & 2 Geo. V, c. 6, reprinted in 17 Chitty's Statutes, 6th ed., p. 61.

on authority, the rule is contrary to the English cases and the better considered American cases. We shall discuss, in turn, both the principles and the authorities; but, before doing so, we note that on the precise point at issue there is no decision or dictum in this Court; and in lower Federal courts there are decisions and dicta which support our position rather than the respondent's.

A, ON THE BASIS OF PRINCIPLE A WITNESS SHOULD NOT BE ALLOWED TO ESCAPE THE PENALTIES OF PERJURY BY RECANTING HIS FALSE TESTIMONY

It would be difficult to overemphasize the importance of not allowing a witness to go unpunished if he deliberately deviates, even for a moment, from the truth. On his veracity on the stand may depend, according to the nature of the case, life, liberty, or property. For this reason a witness is, significantly, at the very start of his testimony,[18] reminded of the awful solemnity of the occasion, and in him is at once instilled the fear both of divine and temporal retribution. Wigmore, *Evidence* (2d ed.), Vol. 3, § 1831. The oath which is customarily administered,[19] and which was administered

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[18] It is said that, unlike our practice, according to the early Roman common law the oath must close the testimony. Wharton's *Criminal Law* (11th ed.) Vol. 2, § 1572. Where the oath closes the testimony it might be proper to mete out punishment only if a falsehood had not been withdrawn.

[19] Under Federal statutes, as at common law (see 13 Halsbury, *Laws of England*, 2nd Ed., p. 748, par. 821), there is no prescribed form of oath, but in the usual and ancient form, the oath concludes with a solemn promise by the wit-

to the respondent by the Senate Committee (R. 37) forcibly reminds the witness that every detail counts, and that at every moment the evidence "shall be the truth * * * *and nothing but the truth.*"

A witness who tells a deliberate falsehood at any stage of an appropriate inquiry not only violates his solemn oath and at least momentarily endangers such life, liberty, or property as may be at stake, but he necessarily delays and hinders justice. His false testimony diverts and misleads both the court and the parties in their search for the truth. As Judge Hough pointed out in *In re Fellerman,* 149 Fed. 244, 247 (S. D. N. Y.), (a contempt case), to tell a lie to a court is a "disregard of authority, in that its jurisdiction to declare the law and ascertain and adjudicate the rights of the parties is hindered, prevented or set at naught."

Once the lie has been told, the interference with the judicial (or legislative) process, and the violation of the integrity of the oath is complete. Retraction cannot undo the damage. Nor should it prevent prosecution. Just as after a larceny is complete the thief cannot purge his guilt by immediate repentance and voluntary restitution,[20] so

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ness that the evidence to be given by him "shall be the truth, the whole truth, and nothing but the truth, so help you God." See *Omychund* v. *Barker*, 1 Atk. 21, 26 Eng. Rep. 15 (Chancery, 1744).

[20] *Rex* v. *Poynton*, 9 Cox. C. C. 249 (Ct. Cr. App. 1862); *State* v. *Von Buren*, 7 Boyce (30 Del.) 79, 82; *State* v. *Scott*, 64 N. C. 586, 587; *Eckels* v. *State*, 20 Oh. St. 508, 510.

after a deliberate lie has been told, the witness cannot purge his guilt by immediate repentance and voluntary or coerced withdrawal of his falsehood. Indeed, the evil is greater, and more clearly beyond repair, in temporary perjury than in temporary larceny. In the case of even momentary perjury the time and power of a court have been inevitably wasted; whereas if property is unlawfully taken for a moment and promptly returned, its brief absence may not have affected the property, or even been noted by its owner. Compare *Commonwealth v. Luckis*, 99 Mass. 431; *Harrison v. People*, 50 N. Y. 518.

But the respondent suggests (Br. Op. 10) that it will promote the discovery of truth to adopt a doctrine under which a witness who deliberately fabricates a tissue of lies to hoodwink a court is permitted to escape punishment if he recants after his fabrications have been exposed by intervening truthful witnesses. In the first place we doubt if such recantation, when it comes, results in any "discovery." The truth has already been discovered, the lie detected. The witness recants not in the belated hope of preventing the law doing injustice to another (Br. Op. 11), but in the desperate hope of preventing the law doing justice to him. In the second place, we doubt if the psychological effect of the suggested doctrine has been correctly portrayed by the respondent. Under the latitudinarian theory proposed, a witness who was

corrupt or who had been tampered with would be apt to tell a falsehood with greater assurance than otherwise, since he would know that if he were contradicted or exposed, he could with impunity withdraw his testimony.[21] Compare Note, 76 U. of Pa. L. Rev. 751. We submit that the fallacy of respondent's doctrine is effectively exposed by Jeremy Bentham's statement that "Of all the guarantees which contribute to the truth of testimony, legal punishment is the strongest." *Treatise on Judicial Evidence* (Dumont ed., 1825) p. 58. And at the present time, when perjury is such an obstacle to justice,[22] and conviction so difficult to secure,[23] it is doubly important not to accept a doc-

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[21] In our Petition for Certiorari, pp. 5–6, we observed that under the doctrine advanced by the respondent and the lower court, "the perjury statute is no longer an effective sanction to insure that honest testimony be given but becomes merely a procedural device through which the truthful testimony, if interposed to refute the perjury, may subsequently corroborated by the perjurer. If the perjury be uncontradicted at the hearing or trial, the perjurer may remain silent, running only the slight risk that there may be a subsequent investigation which will reveal his perjury."

[22] George H. Dession, *Perjury*, Encyclopedia of Social Sciences, Vol. XII, p. 74, notes that perjury "is at present reckoned a serious obstacle to certainty of justice." See also Purrington, *The Frequency of Perjury*, 8 Col. L. Rev. 67.

[23] See Dession, *supra*, p. 76. More recent data show that it is still extremely difficult to get the necessary evidence, and to secure the desired conviction, in a perjury trial. Thus the Annual Report of the Attorney General of the United States for the fiscal year ending June 30, 1935, p. 230, lists 35 convictions for perjury, and for the fiscal year ending June 30, 1936, p. 216, lists 62 convictions for perjury.

trine which would weaken these guarantees and enable a deliberate liar to escape penalties for the injury he has inflicted on the efficiency, dignity and integrity of the judicial process.

Of course we do not mean to say that if a witness does recant his perjury, and does so in a way that aids justice, he should be punished as severely as if he persisted in his falsehood. Undoubtedly a retraction may move a court to mitigate the punishment. And, indeed, such mitigation has precedent both in contempt cases in this country, *The Dunnigan Sisters,* 53 F. (2d) 502, 503–504 (S. D. N. Y.), and in statutes abroad. The German Civil Code, Drage, Sec. 158.

But it is not mitigation, but immunity, for which respondent asks. The doctrine for which he contends, that a deliberate falsehood cannot be punished if a correction is "made while the matter is yet pending" (Br. Op. 13), is not only unsound on its face, but also because of some of the startling corollaries which it implies. If the doctrine were sound, then no witness could possibly be prosecuted for perjury until the case in which he gave the testimony was completed, and his last chance of

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In New York State for the fiscal year 1934 there were 5 convictions for "perjury and attempts" (Annual Report of the State Commission of Correction of New York State for 1934, p. 302). In England during 1934 there were 28 convictions for perjury (Report of the Commissioner of Prisons and the Directors of Convict Prisons for the year 1934, Presented by the Secretary of State for the Home Department to Parliament by Command of His Majesty April, 1936, p. 91).

repentance gone. But this is not the law. A grand jury need not await the end of a trial in which a witness has testified falsely before indicting him for perjury. *People* v. *Hayes,* 140 N. Y. 484; *Hereford* v. *People,* 197 Ill. 222; *Williford* v. *State,* 185 S. E. 611 (Ga. 1936); *United States* v. *Pettus,* 84 Fed. 791, 792 (C. C. W. D. Tenn.); see *Ex parte Hudgings,* 249 U. S. 378, 381 (last paragraph).[24] And, *a fortiori,* a grand jury can indict one who perjures himself before a legislative committee, without waiting for the committee to reach its adjournment date, a date which might be several years ahead, and which might even be beyond the three year statute of limitations applicable to perjury. Act of Dec. 27, 1927, c. 6, 45 Stat. 51; U. S. C., Title 18, Sec. 582.

Moreover, the doctrine suggested by respondent would, as a necessary corollary, imply that if a witness in a single trial, first made an unequivocal, false statement, and later made another statement directly opposite to it, the first statement could not be made the basis of an indictment, and the second statement used as evidence. But such a corollary is unsound. It is settled that contradictory statements in the same case furnish sufficient evi-

[24] In England, it is true that the customary practice has been to postpone a prosecution for perjury until the completion of the trial in which the false testimony was given. Holdsworth, *A History of English Law.* Vol. 4, p. 517. But this practice is not due to any belief that the witness must be given an opportunity until the end of the trial to retract. *Rex* v. *Simmons,* 8 Car. & P. 50, 123 Eng. Rep. 394 (Com. Pleas, 1837).

dence to convict of perjury. *Rex* v. *Thorogood*, 8 Mod. 179, 88 Eng. Rep. 131 (Common Pleas, 1723). Compare *Rex* v. *Knill*, 5 B. & Ald. 929, 106 Eng. Rep. 1431, footnote (K. B., 1822); *People* v. *Burden*, 9 Barb. (N. Y.) 467 (Monroe General Term). See *People* v. *Glass*, 191 App. Div. 483, 485 (N. Y. 2d Dept.); *United States* v. *Wood*, 14 Pet. 430, 437–442; Wigmore, *Evidence* (2d ed.), Vol. 4, § 2043.[25]

The respondent, met with these logical difficulties in his position, turns (Br. Op. 11) to the cases in this country and in England to show that on authority, if not on principle, his position is sound. In order fully to meet this branch of his argument, we shall proceed to consider in turn (1) the English cases; (2) the cases in the state courts; and (3) the cases in the federal courts. The Federal cases are postponed because, as we have said, none of them is in this Court.

B. ON THE BASIS OF AUTHORITY A WITNESS SHOULD NOT BE ALLOWED TO ESCAPE THE PENALTIES OF PERJURY BY RECANTING HIS FALSE TESTIMONY

1. ENGLISH CASES

There is no English case which holds that a witness may escape a conviction for perjury by re-

[25] It is to be observed that as a matter of pleading in some jurisdictions, the indictment must specifically refer to the particular statement alleged to be false, and it is not enough to put both contradictory statements in the indictment and to allow the jury to choose which is false. It is said that such a course might involve double jeopardy. *The King* v. *Harris*, 5 B. & Ald. 926, 106 Eng. Rep. 1430 (K. B. 1922). But compare *People* v. *Burden*, *supra*.

canting before the end of a proceeding such willful falsehoods as he has told; and there are some cases which either hold or, at least, indicate the contrary.

Roy v. *Carr*, 1 Siderfin, 418, 82 Eng. Rep. 1191 (K. B., Trinity Term, 21 Chas. II, 1669), the earliest case, is reported incompletely and partly in French. Dame Carr, the defendant, had in a prior proceeding in Chancery filed an answer indicating that "she received no money, etc." The complainant filed exceptions to this answer. Whereupon, Dame Carr, in order to "explaine le generality del prim" [i. e., of the first answer] filed a second answer stating that "she received no money before such a day." Dame Carr was indicted for perjury. The court directed that she should be acquitted; and ruled that nothing shall be assigned as perjury, which is explained by the second answer, because the second answer makes that which was at first a perjury, no perjury.

As to this case, the first point to be noted is that the original answer was ambiguous, and the second answer was designed to "explaine le generality", not to withdraw the prior pleading. Moreover, it does not appear that the prosecution proved that the defendant had the requisite specific intent to tell a lie. There was no affirmative showing that the falsity of the first statement was deliberate. And (as we have already said, footnote 15, page 35, *supra*) the second and correcting statement will by itself serve as evidence that the first false statement was not willfully made. Hence the court

properly concluded that that which appeared "at first a perjury [became on considering the second statement] no perjury." 1 Siderfin, 418, 419.

This analysis of the *Carr* case must be sound if the case is to have any value at all. To interpret the case more broadly, as the respondent does (Br. Opp. 11), and to spell out of it a doctrine that recantation purges guilt, is, as Lord Eldon said, to make the case no longer acceptable in England,[26] and is, as Lord Coleridge said, to cast grave doubt on the accuracy of Siderfin's reporting.[27]

The next perjury case relied upon by the respondent (Br. Opp. 11) is *Rex* v. *Jones,* Peake 51,

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[26] Referring to the decision of *R.* v. *Carr*, Lord Chancellor Eldon suggested that it was doubtful "whether that would be held now" [i. e., 1813], *Edwards* v. *M'Leay*, 2 Vesey & Beames, 256, 258, 35 Eng. Rep. 316 (Chancery, 1813).

[27] In *Regina* v. *Holl*, 45 Law Times Reports, 69 (2 B. D. 1881), commented on at pages 49–52, *infra*, Chief Justice Coleridge said, with reference to the *Carr* case:

"It is true that a case in Siderfin's Reports, p. 418, was referred to as containing such a doctrine. There the party on an answer to a bill in Chancery had given a false statement that he had received no money, and the answer being set aside as insufficient had afterwards filed an amended answer stating that he had received no money before a certain day, and it was held that this so explained the former answer that it did not make the party liable for perjury. But if this be the effect of the case, then it is open to the observation made by Lord Coke that Siderfin, though he became a considerable lawyer, wrote his reports while young, and they were published after his death without his corrections, and, probably, if that case were looked into, it would be found consistent with the view of the law as expounded by my brother Bow

53; 170 Eng. Rep. 75 (Nisi Prius, King's Bench, After Hilary Term, 31 Geo. III, 1791). A witness who had taken down the defendant's evidence proved the words on which the perjury was assigned, but could not speak to any other part of his evidence. Lord Kenyon directed an acquittal on the ground (p. 53) that "the whole [28] of the Defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any *mistake* he made in another part of it, it will not be perjury." [Italics added.]

It is plain that in the *Jones* case the false statement was due to "mistake," not to a deliberate lie. If the mistake was corrected in the later testimony, it was evidence that there was no *mens rea* when the false statement was uttered.[29] The principle of the *Jones* case has no application to a deliberate lie, or the attempt of the witness to retract (not merely to correct) that lie.

The cases so far discussed relate, as we have already emphasized, solely to erroneous or ambigu-

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[28] Under the later rule, the prosecution need not prove *all* the evidence on the trial, but merely so much of the defendant's evidence as relates to the issue upon which perjury is assigned. *Rex* v. *Dowlin*, Peake 227, 170 Eng. Rep. 138 (K. B. 1792); *Rex.* v. *Rowley*, 1 Mood. 111, 168 Eng. Rep. 1205 (Crown Cases Reserved, 1825); *Commonwealth* v. *Shooshanian*, 210 Mass. 123, 96 N. E. 70.

[29] *Rex* v. *Coote*, 10 British Columbia Reports, 285, 290, like the *Jones* case, holds that a defendant charged with perjury on the basis of an erroneous statement is entitled to show that at the trial where he made the error he subsequently "explained" or "qualified" the statement.

ous statements. In England such statements are not punished as perjury if, during the course of the trial, they are corrected or explained. But punishment is meted out where the first misstatement is a deliberate lie. Reference has already been made, page 44, *supra,* to one early example, *Rex* v. *Thorogood,* 8 Mod. 179, 88 Eng. Rep. 131 (Common Pleas, 1723), where a defendant was summarily summoned to appear in court and upon his admission that his affidavit in the cause was false was punished not for contempt but for perjury. Another even earlier case tending in the same direction is *Allen* v. *Westley,* Hetley 97, 124 Eng. Rep. 372 (1629), where it was recalled that one Styles had been held to be guilty of perjury when he swore that a fact was true which, indeed, was subsequently shown to be true, but which, at the time he uttered the statement, the witness believed to be false. See acc. *Vernon* v. *North* (unreported), referred to in Holdsworth, *History of English Law,* Vol. IV, p. 517, note 3. But we need not rely on cases that go back three hundred years, for we have on this point two English cases in the nineteenth century which are to the same effect.

The first of these nineteenth century cases is *Reg.* v. *Philpotts,* 5 Cox's Criminal Law Cases, 363 (1851) (Ct. Cr. App.). There the defendant had been a witness in an ejectment case. On the stand he had testified that a document which he presented was a copy of the will of one William Joseph and

that he had compared the copy with the original. In fact he had not made the comparison, and the party on whose behalf he testified immediately withdrew the document and it was not in evidence at the end of the case. The defendant was indicted for and convicted of perjury, and in his defense it was argued that there was no perjury because the document was withdrawn. On argument Lord Campbell, C. J., said (p. 366):

> The withdrawal of it can make no difference, because we must look at the state of things when the false swearing took place.

And in the opinion affirming the conviction, Lord Campbell, speaking for the Court of Criminal Appeal, added (p. 366):

> It was withdrawn; but the question whether perjury had been committed, must depend on the state of things when the witness left the box.

Another relatively recent English authority involves a state of facts singularly similar to those presented to this Court in the instant case. *Regina* v. *Holl*, 45 Law Times Reports 69 (Q. B. D., 1881). Affirmed on other grounds, 72 B. Div. 575 (C. A.). The Queen had appointed three commissioners to inquire into the corrupt practices alleged to have been committed during the parliamentary elections in the Borough of Sandwich. A general statute of Parliament, in substance, provided that one who answered truthfully questions put to him by such commissioners should receive from them a certificate which would have the effect

of making him immune from prosecution for any crimes as to which he testified.

The commissioners called one Edwards, an agent of the Liberal Party, and asked him as to a bill which he had sent in to Sir Julian Goldsmid, one of the candidates, which purported to contain the charge made by one Brown for his services at the election. Edwards said that the bill was for £14, that the charge was fair, and that the person shown on the face of the bill to have received the money did so. There the examination of Edwards ended.

But news of this testimony became bruited about; and six days later Brown, the man who was supposed to have received the £14, came before the commissioners, and told them that he had only received £4. Three days after that, Brown produced a letter from Edwards revealing that the latter had himself pocketed the £10 balance.

Following this development, Edwards was recalled to the stand and admitted that he had kept for himself £10. Upon this state of facts, the commissioners refused to grant Edwards a certificate of indemnity. He thereupon applied to the Commissioners for a mandamus to compel them to issue the certificate.

The Queen's Bench Division (Coleridge, C. J., Manisty and Bowen, JJ.) denied the application on two grounds, of which only the first is relevant to the case at bar. They held, first, that the commissioners were right in refusing the certificate inasmuch as Edwards had committed perjury; and,

second, that the courts would not in any event review by mandamus the commissioners' decision.

As to the first point, it had been argued at the bar that a witness who deliberately told a material falsehood was not guilty of perjury if he later made a clean breast of the whole transaction. This contention provoked from the bench the following observations during the argument (p. 70):

> COLERIDGE, C. J. The argument on behalf of Mr. Edwards seems to me to be this. A witness may tell the Commissioners a deliberate tissue of falsehoods, trusting that the witnesses who could disprove them are being kept out of the way, but when finding that they are forthcoming, may come forward and say, "All that I told you before was false; but now the truth is out I may as well acknowledge it", and yet is entitled to his certificate. BOWEN, J. I think there is just this amount of colour in the argument of the other side, that an indictment for perjury could not be sustained on an answer afterwards corrected or explained.

And at the end of the oral argument Lord Coleridge, delivering the only extended opinion of the three judges, ruled [30] as follows:

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[30] The soundness of this reasoning was not impugned when this case was subsequently taken on appeal to the Court of Appeal, and there affirmed on the ground that the Commissioners were not subject to review by mandamus. *The Queen* v. *Holl* (1881) 7 Q. B. Div. 575 (C. A.). Under this appellate determination it was unnecessary to consider the perjury point.

> It has been said that Mr. Edwards did not really deceive them, but did truly answer the Commissioners, because on the whole, from his subsequent examination and letters, the real truth was at last brought to the Commissioners' minds. But if it were true that at the last the truth under pressure of old Mr. Brown's story was coming from Mr. Edwards, it won't avail him. I agree with the law as expounded by my brother Bowen, that if in the course of an examination it turns out from a subsequent answer that an answer of a witness apparently false is found not to have been false, although capable of being construed solely and by itself into a perjurious statement, a prosecution for perjury cannot be sustained. But if a false statement is made by a person, and subsequently a contradiction is made by him which contains the truth, that would not entirely purge the falsehood of the original answer, and so not make it the cause and groundwork of a prosecution for perjury.

Summarizing these authorities, we contend that it is clear that in England a witness who makes a willful, unequivocal misstatement is, regardless of any future retraction, guilty of perjury; although one who makes a careless, erroneous, or ambiguous misstatement may, in order to prove that he is not guilty of perjury, show the jury statements subsequently made by him in the same proceedings which correct, qualify, or explain the first statement.

On the precise point of the effect of a recantation of a deliberate falsehood, there is no authority, by decision or dictum, in the highest court of any of the States of chief importance in criminal law or general jurisprudence. But there are scattered comments in other courts, mostly of inferior jurisdiction.

Two decisions may be said to support our position. *People* v. *Freeman,* 256 Ill. App. 233 (Chicago 1st Dist.) which grew out of a contempt, not a perjury, proceeding, held that a witness who, in the direct examination, gave willfully false testimony, but corrected the testimony on cross-examination, was punishable for a contempt of court. *Martin* v. *Miller,* 4 Mo. 47, also involved, though indirectly, a similar point. This was a slander action in which the plaintiff alleged that the defendant had defamed him by calling him a perjurer. The defendant pleaded truth, and proved that in a prior judicial proceeding the plaintiff had sworn falsely as to the money he had received, but had later recanted. The defendant asked the trial court in the slander case to instruct the jury that if they believed the defendant's proof, the plaintiff had been guilty of perjury. The trial court refused the instruction; judgment went for the plaintiff; and the defendant appealed. On appeal the Supreme Court of Missouri held that the refusal to give the

instruction was reversible error. The court said, pp. 48–49:

> If perjury was committed by plaintiff in denying any matter, it is not perjury the less because on cross-examination or further examination of him, he confessed or stated the matter which he had before denied.

There are other decisions which, at first blush, seem to be against us, but most of which, on careful examination, was in accord with our position. Almost all of these apparently opposed decisions stem from dicta in *People* v. *Gillette,* 126 App. Div. 665, 673 (N. Y. 1st Dept.). The defendant, an officer of a life insurance company, had testified before the grand jury that a certain bank account "is my personal account" and that the money there deposited "Came from my personal account." (Page 667.) "Immediately thereafter and without leaving the witness stand he stated that he received from time to time from certain officers of the insurance company, various amounts of cash to be used for confidential purposes in the interest of the company" (*Ibid*), and the bank account in question was the place in which this cash, after being temporarily placed in the defendant's private safe, was ultimately deposited, and from which disbursements were made for these confidential purposes. The defendant, having been indicted for, and in the trial court convicted of, perjury on the basis of the statements first quoted,

appealed. In the Appellate Division all the judges agreed that the judgment should be reversed. McLaughlin, J., wrote the only extended opinion. He first pointed out that the defendant's original answers were strictly true. But then he added (p. 673–674):

> Even if it be said that the answers were misleading, in that he did not at once explain fully as to the matter, it did no harm, because immediately following such answers, and before he left the witness stand, he told the whole truth with reference to the account and the source from which the fund came. No one was misled; no one was deceived, and no one was injured. There is absolutely no evidence to justify a finding by the jury that he "wilfully, knowingly and corruptly" testified falsely.
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> But I do not choose to rest my conclusion on this ground alone. Even if it be assumed that the answers were false and made with the intention of misleading or deceiving, an indictment for perjury could not be predicated thereon, inasmuch as immediately thereafter he fully explained the nature of the account and the source from which the fund came. A judicial investigation or trial has for its sole object the ascertainment of the truth that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness

> could not correct a false statement except by running the risk of being indicted and convicted for perjury.
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> * * * * *
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> I am of the opinion that the defendant was not legally indicted; that the indictment is fatally defective, and that he was not justly convicted, and that the judgment of conviction should, therefore, be reversed, the indictment quashed and the defendant discharged.

This opinion (with which Ingraham, J., concurred, and in which the three other judges concurred specially), although much more lenient than the English rule, would still not be broad enough to save the respondent in the case at bar. For the situation covered by the dictum is quite different from the one at bar. There at worst the original misstatements were equivocal and "misleading" (p. 673); here they were clear unambiguous lies. There there was "no evidence to justify a finding by the jury that he [the defendant] 'wilfully, knowingly, and corruptly' testified falsely" (p. 673); here the evidence shows that the respondent "knew at the time of testifying [that] * * * what he was saying was not true" (R. 37). There the defendant "immediately * * * before he left the witness stand * * * told the whole truth" (p. 673); here the respondent waited

until after seven intervening witnesses had spoken, and then he still had to be prodded to confess so much of his perjury as had already been detected. (R. 38, 9 lines from the bottom of the page.)

The dictum in the *Gillette* case was reiterated, again as a dictum, in *People* v. *Brill,* 100 N. Y. Misc. 92, 102 (Gen. Sess.) The defendant, in the course of a prior trial, had been asked whether he had signed a particular paper. At first he denied it. "This defendant's attention was not at first directed to the particular paper and when a photographic copy of it was subsequently shown him he told the truth and admitted that he had signed it" (p. 102). In determining that there was no perjury, the court rested its decision on the ground that the paper was not material. But the Court gratuitously added that the retraction would have wiped out the perjury. Even if this view were sound it would not apply to a case like that at bar where the question and answer are unambiguous; the intent to lie is admitted; and the retraction occurs only after intervening witnesses have exposed the falsehood.

Indeed, in New York itself the dictum in the *Gillette* case (which, it may be noted, has never had the express or implied approval of the Court of Appeals of that State) was not applied to relieve the guilt of a witness who made a retraction of his first falsehood only after he had left the witness

stand. *People* v. *Markan,* 123 Misc. Rep. 689, 206 N. Y. Supp. 197.[31]

The Gillette theory has unfortunately had some currency outside of the jurisdiction in which it was uttered. Thus a similar view was adopted in Indiana in a case involving the correction of an *erroneous* and probably careless statement, *Henry* v. *Hamilton,* 7 Blackford, 506,[32] and in Florida in

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[31] In this case the defendant had been indicted for subornation of perjury by two persons named Kaplan and Goldstein, and he defended on the ground, *inter alia*, that they had not committed perjury. The facts were that Kaplan and Goldstein, being summoned to testify in a trial court, had deliberately made materially false statements. Several months after their examination and cross-examination had been completed, but before the trial court decided the case, the same witnesses came in and corrected their testimony. It was argued that under the doctrine of the *Gillette* case this avoided the crime of perjury. But the argument was rejected, Collins J. holding (p. 199–200) that—

"The cases referred to did not go to the extent of holding that after an interval of several months the correction of testimony indicating the utter falsity of that previously given would destroy perjury, nor did they hold even by inference, as contended by the defendants in this case, that correction at any time before the termination of a trial by decision would cure perjury committed."

[32] This was a tort action for slander. The plaintiff alleged that the defendant had slandered him by calling him a perjurer; and in answer the defendant justified by pleading the truth of the statement. On the evidence it appeared that in a prior unrelated suit this plaintiff, testifying as a witness, had first said that this defendant had thrown one Roysdon off a bench, and knocked a candle from the hand of one Remington; but later in that prior suit, the then witness (now plaintiff) corrected his error. On the basis of

a case in which the defendant qualified a prior statement in which he had fixed with too great assurance a particular date as to which he later admitted he had some uncertainty. *Brannen* v. *State,* 94 Fla. 656, 114 So. 429.[33] In only one case, however, and that in a court of limited authority, has the dictum been cited to purge the guilt of a witness who had deliberately lied and then recanted. *Commonwealth* v. *Irvine,* 14 Penn. Dist. & County Rep. 275.[34] And even there the retraction took

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this evidence the lower court ruled (and the appellate court affirmed) that the plea of truth in the slander suit failed since "a witness, who had made an *erroneous* statement in giving evidence, but who subsequently corrected it, is not guilty of perjury in making such statement" (p. 509). [*Italics added.*]

[33] In a trial in which the chastity of a woman was in issue, the defendant first testified that he had seen one Thomas embrace the woman on Easter Sunday. Later, and before he had been contradicted (p. 660), he testified that he was not positive whether it was Easter Sunday, the Sunday before or the Sunday after. On the basis of the first statement, the defendant was indicted and convicted of perjury. On appeal the conviction was reversed on the ground that where, before the final submission of a case, a witness corrects or modifies a false statement, he cannot be convicted of perjury on the basis of his original misstatement. (pp. 662–663.)

[34] *Com.* v. *Irvine,* 14 Penn. Dist. & County Rep. 275. In a prior proceeding the defendant had first testified that certain jewelry had been stolen from him; but as he was pressed by further questioning he admitted that he had pawned the jewelry. He was indicted for perjury in the first statement, and on the trial demurred to the evidence. The demurrer was sustained on the ground that the false testimony having been corrected was not punishable as perjury.

place while the witness was still on the stand and before others had exposed him.

From this review it appears that none of the state cases cited by the respondent goes so far as to allow a witness to go scot free if he deliberately lies, waits until he is contradicted, and then takes the stand to recant.

3. CASES IN THE FEDERAL COURTS

There are two Federal cases which squarely support our position. In *Masaichi Ono* v. *Carr*, 56 F. (2d) 772 (C. C. A. 9th), it was held that an alien who admitted that he had given deliberate false testimony on his direct examination on November 12, and retracted it in his cross-examination on the following November 21, was guilty of perjury and could, on that ground, be denied admission to the United States. In *Ex parte Chin Chan On*, 32 F. (2d) 828 (W. D. Wash.), it was held that an alien who had admitted that he had made a deliberately false statement on January 23, before the immigration authorities, and recanted on the following March 11, before the same authorities, was guilty of perjury and could properly be denied entry to this country. Compare *Johnson* v. *United States*, 41 F. (2d) 44, 46 (C. C. A. 9th); see *Seymour* v. *United States*, 77 F. (2d) 577, 582 (C. C. A. 8th), quoted pages 33–34, *supra*.

Moreover, it seems that a bankrupt who first denies that he has any assets and then admits the contrary can be prosecuted for perjury. *In re*

Gordon, 167 Fed. 239, 240 (S. D. N. Y.); *In re Wiesebrock,* 188 Fed. 757, 758 (E. D. N. Y.).

Where the *Gillette* dictum has been cited to a Federal court, it has not been followed, much less extended to cover a case where the witness does not recant before he leaves the witness stand. Thus, when the *Gillette* case was drawn to his attention in *Ex parte Keizo Shibata,* 35 F. (2d) 636 (C. C. A. 9th), Circuit Judge Dietrich, with unconcealed skepticism, said that "if that be the law" (p. 638) it means no more than that "where a witness who has given false testimony retracts it *before he leaves the witness stand,* it cannot be made the basis of a perjury charge." [Italics added.] (p. 637.) Compare *Masaichi Ono* v. *Carr, supra:* And when Circuit Judge Learned Hand was referred to the *Gillette* case, he said that the Second Circuit Court of Appeals did "not rely upon that case or mean to accept the doctrine," though "*Perhaps* all a man's testimony upon a *continued* inquiry must be taken together, and no prosecution will lie if he recants before he is through." [Italics added.] *Loubriel* v. *United States,* 9 F. (2d) 807, 808 (C. C. A. 2d).

The only federal case which the respondent cites, *Bijur* v. *Bendix,* 285 Fed. 974 (App. D. C.), is not opposed to our position. The *Bijur* case was a patent controversy in which one claimant urged that his adversary and some of the latter's witnesses perjured themselves before a Patent Office tribunal, and one of the witnesses was particularly assailed because he "made an incorrect answer to a question on cross-examination" though he

"rectified it almost immediately" (p. 975). The court ruled that this was not perjury. Of course that ruling has no bearing on the case at bar since there, unlike here, the answer was merely incorrect, not false, and due to inadvertence, not design. Moreover, the correction followed fast upon the heels of error.

In short, we contend that upon authority no less than upon principle a witness who, with intent to deceive, has given an unequivocally false statement, is guilty of perjury, and he cannot purge his guilt by returning to the stand and retracting his falsehood.

CONCLUSION

We therefore respectfully submit that the judgment of the court below should be reversed.

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FEBRUARY, 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937